

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

DANIEL GARY GASS,

Respondent.

Supreme Court Case
No. SC12-937

The Florida Bar File
No. 2011-51,529 (17I)

FILED
JOHN A. TOMASINO
NOV 04 2013
CLERK, SUPREME COURT
BY _____

REPORT OF REFEREE

I. **SUMMARY OF PROCEEDINGS**

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

The Florida Bar filed its complaint in The Florida Bar File No. 2011-51, 529 (17I) with the Supreme Court of Florida on or about May 7, 2012. Thereafter, the undersigned was appointed to preside as referee in this proceeding by order of the Chief Judge of the Fifteenth Judicial Circuit. The final hearing was held on September 9, 2013, followed by a sanction hearing on September 24, 2013. The Florida Bar presented four witnesses at the final hearing: John Bria, Sr., Georgiann Bria, John Bria, Jr. and David Tangora. Counsel for the Respondent presented three witnesses at the final hearing: Respondent, Dorciane Polito and

Gary Gibbons and four character witnesses at the sanction hearing: Marshall Platt, Marc Rohr, Larry Seidlin and James Scott. The pleadings, and all other papers filed in this cause, which are forwarded to the Supreme Court of Florida with this report, constitute the entire record.

During the course of these proceedings Respondent initially appeared pro se and was later represented by Kevin P. Tynan. The Florida Bar was represented by Ghenete Elaine Wright Muir.

II. FINDINGS OF FACT

Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

Narrative Summary Of Case.

1. This case arises from Respondent's lack of diligence and communication in representing his clients, Complainants John Bria, Sr. and Georgiann Bria (hereinafter referred to as "the Brias") in a civil lawsuit.
2. As a result of Respondent's misconduct the Brias, a married couple, were both held in contempt of court and incarcerated. John Bria, Sr., who was 69 years old at the time, was incarcerated for three days and two nights and Georgiann Bria who was 66 years old at the time, was incarcerated for three nights. Neither of the Brias had ever been arrested or incarcerated prior to this case.

3. The Brias were the owners of Florida Safety Equipment Company Inc., a family business that had existed and thrived for approximately 30 years. In approximately 2008 the company began to face financial challenges that led to legal challenges.

4. In approximately April 2010, the Brias met with and hired the Respondent to handle a number of legal issues the most important of which was the case styled Mark C. Weldon v. Florida Safety Equipment Company Inc., et al. (hereinafter referred to as "the Weldon case").

5. When the Respondent was hired there was already a default judgment in the Weldon case regarding a debt owed by the Brias and their company. The Brias informed the Respondent during the April 2010 meeting that they were subpoenaed by the plaintiff's attorney to be deposed and produce documents.

6. Both the Brias and their son, John Bria, Jr., who was very involved in the family business and the legal issues including the Weldon case, testified at the final hearing that the Respondent advised them not to attend the deposition.

7. John Bria, Jr. further testified that he provided the Respondent with the subpoenas duces tecum served by plaintiff's counsel requiring the Brias appear for deposition and produce documents on May 25, 2010. The facsimile provided to Respondent by John Bria, Jr. on May 24, 2010, which enclosed the Subpoena

Duces Tecum for Deposition was admitted into evidence as The Florida Bar Exhibit 1.

8. Based on Respondent's advice, the Brias did not appear at the deposition.

9. Based on the Respondent's advice the Brias failed to attend the May 25, 2010, deposition. A Petition for Order to Show Cause was filed by the plaintiff and the court entered an Order to Show Cause dated June 21, 2010, finding the Brias in contempt, but allowing them to purge the contempt by appearing at the rescheduled depositions on June 22, 2010, and providing the documents demanded.

10. John Bria, Jr. testified that he provided the petition for Order to Show Cause to the Respondent. The facsimile provided to Respondent by John Bria, Jr. on June 14, 2010, which enclosed the Plaintiff's Petition for Order to Show Cause to Defendant's was admitted into evidence as The Florida Bar Exhibit 2.

11. The Brias attended the June 22, 2010, deposition, however, the Respondent failed to attend the deposition with his clients.

12. Respondent formally entered his appearance as counsel for the Brias on July 13, 2010. The Notice of Appearance was admitted into evidence as The Florida Bar Exhibit 3.

13. I find that it is clear that Respondent was representing the Brias prior to the Notice of Appearance and that Respondent should have been present at the Brias

deposition. Respondent's failure to attend is a clear indication of a lack of diligence in representing the Brias.

14. Although the Brias attended the June 22, 2010, deposition the Brias did not provide all of the documentation demanded in plaintiff's request for document production.

15. The Brias informed the Respondent that they did not have any additional documents to provide to the plaintiff. However, the Respondent failed to inform the plaintiff's counsel that there were no additional documents.

16. Once the Respondent filed his Notice of Appearance, the Brias no longer received correspondence directly from the Plaintiff and relied on the Respondent to keep them informed about the status of the case.

17. On July 27, 2010, plaintiff's counsel filed a second Petition for Order to Show Cause. Respondent received this petition but did not notify the Brias.

18. On August 23, 2010, the court entered an ex part Order to Show Cause ordering the Brias to produce the documents that had not been previously produced. The Respondent received this petition but did not notify the Brias.

19. The Order to Show Cause required the documents to be produced 5 business days prior to October 4, 2010, the date of the Show Cause hearing.

20. Respondent received the Order to Show Cause but did not notify the Brias and did not notify the plaintiff's counsel that the Brias did not have any additional documents to provide.

21. Respondent's failure to notify his clients of the Order to Show Cause petition and order violates the Rules Regulating The Florida Bar which requires a lawyer to act with reasonable diligence and promptness in representing a client and requires a lawyer to keep the client reasonably informed about the status of a matter.

22. Respondent testified at trial that the Brias directed Respondent not to attend the October 4, 2010, hearing. I find that Respondent's testimony was not credible.

23. The Brias testified that they were never informed of the October 4, 2010, hearing and would not have requested that the Respondent not attend. I find the Brias testimony to be credible.

24. Despite receipt of the order, Respondent failed to appear at the October 4, 2010, hearing. Respondent's failure to appear on behalf of his clients was once again a lack of diligence as well as conduct prejudicial to the administration of justice.

25. Respondent testified that he thought he was not needed at the October 4, 2010, hearing because he was aware that the Brias had hired a bankruptcy attorney, David Tangora. The Respondent further testified that a personal bankruptcy filing

would stay the proceedings in the Weldon case and that he believed Mr. Tangora was filing for personal bankruptcy on behalf of the Brias.

26. However, I find the Respondent never contacted Mr. Tangora to determine if personal bankruptcy was indeed being filed. Furthermore, I find the Respondent never filed a Motion to Withdraw or Substitution of Counsel. He remained counsel on the case and should have attended the hearing.

27. In January 2011, the court entered a Renewed Order Regarding Hearing on Order to Show Cause on October 4, 2010. The Renewed Order was admitted into evidence as Respondent's Exhibit 6.

28. The Brias were personally served with the Renewed Order and wrote a letter to Respondent's secretary dated January 17, 2011. In that letter the Brias indicate that they have provided all the documents to the plaintiff and seek guidance from the Respondent's office. The letter dated January 17, 2011, was admitted into evidence as Respondent's Exhibit 5.

29. The Brias testified that after sending the letter they communicated with the Respondent's secretary who indicated that the Respondent was addressing the Order to Show Cause.

30. In February 2011, the court entered an Amended Renewed Order Nunc pro Tunc as of January 10, 2011, Regarding Hearing on Order to Show Cause on

October 4, 2010. The Amended Renewed Order was admitted into evidence as Respondent's Exhibit 7.

31. The order gave the Brias 10 days from the date that the February 2011 order was served upon them to cure the contempt by producing the documents required.

32. If they did not produce the documents, *capias* and bench warrants would be issued and both John and Georgiann Bria would be incarcerated.

33. The Respondent testified that throughout his representation of the Brias he repeatedly warned the Brias that if they did not provide additional documents to the plaintiff or file personal bankruptcy they would be incarcerated. I find this testimony completely lacking in credibility. The Respondent has no record of a telephone conversation or a meeting when he provided this advice and does not have even one writing to his clients providing this warning of the impending incarceration.

34. Furthermore, the Brias testified that they were never warned of the possibility of being incarcerated nor advised to file for personal bankruptcy. They testified that if they had been so warned they would have certainly taken action to avoid being arrested and jailed. Again, I find the Brias' testimony to be credible.

35. The Brias testified that they had retained bankruptcy attorney David Tangora to handle the corporate bankruptcy and if they knew it was necessary they would have certainly directed Mr. Tangora to file personal bankruptcy as well.

36. Mr. Tangora testified at trial that he was working with the Brias on their corporate bankruptcy and that the Brias never told him that they needed to file personal bankruptcy. Mr. Tangora also testified that the Respondent never contacted him to inform him of the urgent need to file a personal bankruptcy on behalf of the Brias.

37. Further, Mr. Tangora testified that if he had been informed when the Respondent received the Renewed Order Regarding Hearing on Order to Show Cause on October 4, 2010, in January 2011 or the Amended Renewed Order *Nunc Pro Tunc* as of January 10, 2011, Regarding Hearing on Order to Show Cause on October 4, 2010, in February 2011 he could have filed the personal bankruptcy to ensure the Brias were not incarcerated.

38. The Respondent also testified that the Brias had received the Renewed Order to Show Cause in January 2011 and would therefore be aware of the potential arrest. The Respondent's expectation that his clients interpret a legal document on their own indicates a callous indifference to his clients and is contrary to his ethical obligations as an attorney.

39. On or about February 20, 2011, capias and bench warrants were issued and John and Georgiann Bria were arrested and placed in the Broward County Jail.

40. The Respondent testified during cross examination that he did receive the capias and bench warrants prior to the date of arrest and contacted and warned the

Brias. However, on direct examination the Respondent testified he did not get the warrant prior to arrest of the Brias. Respondent presented no credible evidence of communicating with his clients at this crucial time.

41. Respondent's failure to communicate with the Brias is a clear violation of the Rules Regulating The Florida Bar. It is unacceptable for the Respondent to not have any form of written correspondence with his clients.

42. Further, prior to the Brias' incarceration the Respondent failed to inform the court that was holding them in contempt that the Brias had provided all of the documents in their possession.

43. Only after his clients were incarcerated did Respondent take any action on their behalf. Respondent filed personal bankruptcy on behalf of the Brias and an Emergency Motion to Strike Capias and Bench Warrant. The Motion to Strike Capias and Bench Warrant was granted and the Brias were released.

44. Both of the Brias testified about their very traumatic experience of being arrested and incarcerated. The officers knocked on the front door of their home and informed them of the warrants for their arrest. The Brias were in utter disbelief as they were taken into custody. They frantically called the Respondent with hopes that some immediate action could be taken to prevent their arrest.

45. Mrs. Bria in particular was distraught and testified very emotionally about the anguish and fear she felt when she was incarcerated which involved being

transported to three separate jail facilities and included being transported from the Broward County jail to the Miami-Dade County jail.

46. Mrs. Bria testified about the humiliation of being handed a mat to sleep on the floor. She testified about being packed into a small room with countless women. To date, Mrs. Bria feels terror when someone knocks on the door of her house and has requested that guests contact her by telephone rather than knock on the door.

47. Based on the evidence presented coupled with my credibility findings, I conclude by clear and convincing evidence that throughout the Respondent's representation of the Brias the Respondent failed to act with reasonable diligence and promptness as required by R. Regulating Fla. Bar 4-1.3; failed to adequately communicate with the Brias as required by R. Regulating Fla. Bar 4-1.4(a) (3), (4) and (5); and engaged in conduct in connection with the practice of law that is prejudicial to the administration of justice contrary to R. Regulating Fla. Bar 4-8.4(d).

III. RECOMMENDATIONS AS TO VIOLATIONS OF THE RULES

REGULATING THE FLORIDA BAR:

Based upon the evidence presented, I find the following:

As to Count I: By the conduct set forth above, Respondent is guilty of having violated R. Regulating Fla. Bar 4-1.3 [A lawyer shall act with reasonable diligence

and promptness in representing a client.] and guilty of having violated R.

Regulating Fla. Bar 4-8.4(d) [A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.]. I find Respondent not guilty of violating R. Regulating Fla. Bar 4-3.2 [A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client].

I find that Respondent violated the above rules with the following conduct:

- (i) Advising the Brias not to attend the deposition scheduled on May 25, 2010;
- (ii) Failing to attend the deposition on June 22, 2010;
- (iii) Failing to inform the Brias of the July 27, 2010, Petition for Order to Show Cause;
- (iv) Failing to inform the Brias of the August 23, 2010, Order to Show Cause;
- (v) Failing to inform the Brias of the October 4, 2010, Order to Show Cause Hearing;

- (vi) Failing to attend the October 4, 2010 hearing;
- (vii) Failing to inform the plaintiff's counsel that the Brias had produced all the documents they had in their possession;
- (viii) Failing to inform the court that the Brias had produced all the documents they had in their possession; and
- (ix) Failing to inform the Brias that they could be incarcerated if they did not produce the documents or file personal bankruptcy.

As to Count II: By the conduct set forth above, Respondent is guilty of having violated R. Regulating Fla. Bar 4-1.4(a) [A lawyer shall: (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law.] and guilty of having violated R. Regulating Fla. Bar 4-8.4(d) [A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion,

national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.].

I find that Respondent violated the above rules with the following conduct:

- (i) Failing to inform the Brias that they could be incarcerated;
- (ii) Failing to provide any written correspondence to the Brias;
- (iii) Failing to inform the Brias of the July 27, 2010, Petition for Order to Show Cause;
- (iv) Failing to inform the Brias of the August 23, 2010, Order to Show Cause;
- (v) Failing to inform the Brias of the October 4, 2010, hearing;
- (vi) Failing to inform the Brias that filing personal bankruptcy would ensure that they would not be at risk of incarceration;
- (vii) Expecting the Brias to determine the meaning of the Order they received in January 2011 without his counsel;
- (viii) Failing to respond to the Brias' January 2011 request for information;
and
- (ix) Failing to take any action to prevent the incarceration of the Brias.

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

4.42 Suspension is appropriate when:

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or

(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

V. CASE LAW

I considered the following case law prior to recommending discipline:

In The Florida Bar v. Maier, 784 So. 2d 411 (Fla. 2001) Maier received a 60 day suspension for neglect of a client's case.

In The Florida Bar v. Byron, 400 So. 2d 13 (Fla. 1981) Respondent received a public reprimand and 60 day suspension for neglecting a client.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that Respondent shall be:

- A. Suspended for a period of 60 days; and
- B. Payment of The Florida Bar's costs in these proceedings.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(k)(1), I considered the following:

Personal History of Respondent:

Age: 46

Date admitted to the Bar October 3, 1994

Aggravating Factors:

9.22(a) prior disciplinary offenses;

Prior Discipline: Respondent received a public reprimand in 2011 for a trust account violation. Respondent failed to promptly interplead funds that were held in trust.

9.22(i) substantial experience in the practice of law.

Mitigating Factors:

9.32(b) absence of a dishonest or selfish motive;

9.32(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

9.32(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

9.32(g) character or reputation;

9.32(l) remorse.

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

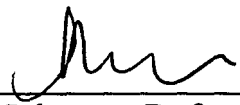
I find the following costs were reasonably incurred by The Florida Bar:

| | |
|-----------------------|------------|
| Court Reporters' Fees | \$4,030.50 |
| Investigative Costs | \$ 247.50 |
| Bar Counsel Costs | \$ 191.24 |
| Administrative Costs | \$1,250.00 |

TOTAL \$5,719.24

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 21 day of Oct. , 2013.



Laura Johnson, Referee

Original To:

Clerk of the Supreme Court of Florida; Supreme Court Building; 500 South Duval Street, Tallahassee, FL 32399-1927

Conformed Copies to:

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